91-884

Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

October Term, 1991

FARM CREDIT SERVICES

Petitioner,

vs.

RAYMOND LIONE MORTER D/B/A SWINENGINEERING, INC.

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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27-2-5-1 Spendthrift laws; exemption from judicial process

Sec. 1. No person entitled to receive benefits under a life insurance or life annuity contract, or under a written agreement supplemental thereto, issued by domestic life insurance company, shall be permitted to commute, anticipate, encumber, alienate, or assign such benefits, if the right to do so is expressly prohibited or withheld by a provision contained in such contract or supplemental agreement. And, if such contract, policy or supplemental agreement so provides, such benefits, except when payable to the person who provided the consideration for such contract, shall not be subject to such persons' debts, contracts, or engagements, nor to any judicial process to levy upon or attach the same for payment thereof.

Historical Note

Formerly:

Acts 1931, c. 20, s. 1.

Cross References

Children and minors, competence to execute assignments, see section 27-2-11.1-2. Fraternal benefit societies.

Dependent benefits, exemption from claims of creditors, see section 27-7-7-1.

Exemption of benefits from legal process, see section 27-1-14-16.

Mutual life and accident insurance,

Assignment of policy to person with no insurable interest, see section 27-8-3-8.

Exemption of benefits from legal process, see section 27-8-3-23.

Power to hold proceeds under trust or other agreement, see section 27-1-12-21.

Library References

Spendthrifts 1. I.L.E. Trusts §103.
C.J.S. Spendthrifts §§2, 3.

34-2-28-1 List of exemptions; limitations

Sec. 1. (a) The following property of a judgment debtor domiciled in Indiana is not subject to levy or sale on execution or any other final process from a court, for a judgment founded upon an express or implied contract or a tort claim:

(1) Real estate or personal property constituting the personal or family residence of the judgment debtor or a dependent of the judgment debtor, or estates or rights in that real estate or personal property, of not more than seven thousand five hundred dollars ($7,500). The exemption under this subsection is individually available to joint judgment debtors concerning property held by them as tenants by the entireties.

(2) Other real estate or tangible personal property of four thousand dollars ($4,000).

(3) Intangible personal property, including choses in action (but excluding debts owing and income owing), of one hundred dollars ($100).

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT GARY/LAFAYETTE

IN RE:	)	
	)	
RAYMOND LIONE MORTER	)	BANKRUPTCY NO.
aka/dba:	)	86-40369
Swinengineering, Inc.	)	
	)	
Debtor	)	

MEMORAMDUM OPINION AND ORDER[1]

I
Statement of Proceedings

This Chapter 7 case came before the Court on the objections filed by Farm Credit Services of Madison, Wisconsin d/b/a Production Credit Association and d/b/a The Federal Bank Association (hereinafter: "FCS") on August 8, 1986, and by the Chapter 7 trustee on August 5, 1986 to the Debtor's Schedule B-4 of property claimed exempt.

On February 7, 1989, the parties filed their stipulation of facts.

By Order of Judge Grant on February 23, 1989, he recused himself as to this contested matter, and by Order of March 6, 1989, Judge Lindquist assumed jurisdiction of the same.

The Order of February 23, 1989 further provided that the issues raised by the objections were to be submitted on the parties pretrial statements, stipulation of facts and briefs.

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[1]This Order constitutes the Court's Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52 as made applicable by Bankruptcy Rule 9014 and 7052.

II
Conclusions of Law and Discussion

No objection was made by counsel to the jurisdiction of this Court as to this matter, the Court finds jurisdiction to be present, and that this contested matter is a core proceeding pursuant to 28 U.S.C. §157.

Pursuant to 11 U.S.C. §522(b) and I.C. 34-2-28-0.5 Indiana has "opted-out" of the federal exemption scheme, thus the Indiana Exemption Statutes are applicable to the Debtor's property claimed exempt in this case.

Indiana Code 34-2-28-0.5 provides as follows:

> Sec. 0.5. In accordance with section 522(b) of the Bankruptcy Code of 1978 (11 U.S.C. 522(b)), in any bankruptcy proceeding, an individual debtor domiciled in Indiana:
>
> (1) is not entitled to the federal exemptions as provided by section 522 (d) of the Bankruptcy Code of 1978 (11 U.S.C. 522(d)); and
>
> (2) may exempt from the property of the estate only that property specified by Indiana law.

Indiana Code 34-2-28-1 provides as follows:

> (a) The following property of a judgment debtor domiciled in Indiana is not subject to levy or sale on execution or any other final process from a court, for a judgment founded upon an express or implied contract or a tort claim:
>
> (1) Real estate or personal property constituting the personal or family residence of the judgment debtor or a dependent of the judgment debtor, or estates or rights in that real estate or personal property, of not more than seven thousand five hundred dollars ($7,500). The exemption under this subsection is individually available to joint judgment debtors concerning property held by them as tenants by the entireties.

(2) Other real estate or tangible personal property of four thousand dollars ($4,000).

(3) Intangible personal property, including choses in action (but excluding debts owing and income owing), of one hundred dollars ($100).

(4) Professionally prescribed health aids for the judgment debtor or a dependent of the judgment debtor.

(5) Any interest the judgment debtor has in real estate held as a tenant by the entireties on the date of the filing of the petition for relief under the bankruptcy code, unless a joint petition for relief is filed by the judgment debtor and spouse, or individual petitions of the judgment debtor and spouse are subsequently consolidated.

(b) This section does not apply to judgments obtained before October 1, 1977.

(c) The total value of exempted property under subdivisions (1), (2), and (3) may not exceed ten thousand dollars ($10,000).

The Debtor's Schedule B-4 claims as exempt, among other things, the following property:

Type of Property	Location, Present use, etc. of property	Specify statute creating the Exemption	Value Claimed Exempt
Annuity	College Retirement & Equity Fund & Teachers Insurance & Annuity	I.C. 27-2-5-1 I.C. 34-2-28-1	$280,795.86
Life Insurance Policy	New York Life Insurance Policy No. NP 118 877	I.C. 27-2-5-1 I.C. 34-2-28-1	4,000.00

The objection of FCS asserts that the Debtor's claimed exemptions are in excess of the exemption limits provided by Indiana law, that the exemptions claimed under I.C. 27-2-5-1

are not applicable to the intangible property the Debtor identifies as exempt, and are otherwise improper.

The objection of the trustee generally asserts that the exemption claimed by the Debtor in his College Retirement Equities Fund and Teachers Insurance and Annuity Contract in the sum of $280,795.86 is not an exempt asset.

On October 10, 1986, the Debtor, pursuant to Court Order of September 12, 1986 filed true and complete copies of the relevant "Fund" document and the "Annuity" document in which the Debtor claims an exemption.

The stipulation filed by the parties on February 7, 1989 recites the following:

> 1. That the Debtor's employer, Purdue University (hereinafter: "Purdue") pays the entire cost of participation in the employees-Debtor's Teacher's Insurance and Annuity Association of America (hereinafter: "TIAA") Periodic Premium Retirement Annuity Contract, and College Retirement Equity Fund (hereinafter: "ICREF") contract. *See* p.7 of Retirement Plan Booklet (hereinafter: "Booklet").
>
> 2. That the Debtor as a participant may make voluntary extra payments to the Retirement Funds (Booklet, p. 10), but the Debtor has not made any extra voluntary payments.
>
> 3. That the applicable anti-alienation language appears at paragraphs 16 and 17 of the TIAA contract and at paragraphs 16 and 17 of the CREF contract.
>
> 4. That it "would appear" that if the Debtor-participant terminates employment prior to retirement, the benefits in the plans remain vested and are payable at retirement age or participation can continue if employment is resumed at an educational institution involved in the TIAA and CREF plans (*See*, Booklet, p. 11).
>
> 5. The Booklet provides that the plans do not provide for loans or have cash surrender value (*See*, Booklet, p. 11).
>
> 6. That the Debtor was born on September 7, 1920; that

from August 1, 1959 through June 30, 1960, the Debtor began participation in the TIAA and CREF plans while an employee at Iowa State University; that effective July 1, 1960, the Debtor began his employment at Purdue; and, that to the "best of Raymond L. Morter's knowledge" the provisions set out above with regard to the TIAA and CREF contracts were in effect at the time he began participation thereunder.

7. That the mandatory retirement age is 70; that annuity income begins not later than April 1 of the calendar year following the year in which the annuitant attains the age of 70 1/2 years; and, that under "current law and TIAA practice" an annuitant may postpone the start of annuity income for a year at a time provided he continues to be employed by an institution with a TIAA and CREF retirement or tax deferred annuity plan.

8. That the Debtor is presently employed at Purdue and is not eligible to obtain annuity payments for the TIAA and CREF plans.

The GENERAL PROVISIONS of the TIAA specimen contract at paragraphs 16 and 17 as submitted to the Court on October 10, 1986 by Debtor's counsel provide as follows:

16. No Assignment. Any assignment or pledge of this contract or of any benefit hereunder shall be void and of no effect.

17. Protection Against Claims of Creditors. The benefits, options, rights and privileges accruing to any Beneficiary will not be transferable or subject to surrender, commutation, or anticipation, except as may be otherwise endorsed on this contract. To the extent permitted by law, annuity and other benefit payments will not be subject to the claims of any creditor of any beneficiary or to execution or to legal process.

The GENERAL PROVISION section of the CREF specimen contract filed with the Court on October 10, 1986 by Debtor's attorney at paragraphs 16 and 17 provide as follows:

16. No Assignment. Any assignment or pledge of this certificate or of any benefit hereunder will be void and of no effect.

17. Protection Against claims of Creditors. Benefits under this certificate are protected by the following clause contained in the statute of the State of New York establishing CREF:

> No money or other benefit provided or rendered by the corporation hereby formed, nor any rights or interests of any participating person in any benefit provided by said corporation, or of any beneficiary of any such person, or any others who may have a right derived from any such person or beneficiary, shall be subject to assignment or pledge, or be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of any such person, or of any beneficiary of any such person, or of any others who may have a right under any such person or beneficiary.

The Supreme Court has stated the following regarding the debtor's property and whether it is included in the debtor's bankruptcy estate:

> Property rights are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a state serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy.

Butner v. United States, 440 U.S. 48, 55, 99 S. Ct. 914, 918, 49 L. Ed.2d 136 (1979). (Citation omitted).

Generally, the designation under §541 is broad enough to include "all interests of the debtor, both legal and equitable, . . ." *United States v. Whiting Pools, Inc.*, 462 U.S. 198,

204-205 & nn. 8, 9, 103 S. Ct. 2309, 2313 & nn. 8, 9, & 10 76 L. Ed.2d 515 (1983). The Supreme Court at n. 8 stated, "The legislative history indicates that Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title", and n. 10, where the Court stated, "We do not now decide the outer boundaries of the bankruptcy estate. We note only that Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition."

The Seventh Circuit Court of Appeals in the recent case of *Koch Refinery v. Farmers Union Cent. Exchange*, 831 F.2d 1339 (7th Cir. 1987), stated as follows:

> *Section 541* of the Bankruptcy Code, which creates the bankruptcy estate, *offers an expansive definition of property* comprising the estate: Whatever "legal and equitable interests" the debtor had in property as of the filing of the bankruptcy petition is property of the bankruptcy estate. *The debtor's interest in property is determined by non-bankruptcy law, but the determination of what constitutes section 541 property is a federal question.* H.R. Rep. No. 595, 95th Cong., 1st Sess. 367-68 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82-83 (1978), U.S. Code Cong. & Admin. News 1978, p. 5787. Once the bankruptcy petition has been filed, property rights belonging to a debtor under state law become assets of the estate. *Butner v. United States*, 440 U.S. 48, 54, 99 S. Ct. 914, 917, 59 L. Ed.2d 136 (1979); *Matter of Kaiser*, 791 F.2d 73, 74 (7th Cir. 1986), *cert. denied*, — U.S. — , 107 S. Ct. 655, 93 L. Ed.2d 710 (1986).

Id. at 1343. (Emphasis added).

Thus, state law, here that of the State of Indiana, controls as to what property rights are created in the TIAA and CREF contracts as the Bankruptcy Code does not speak directly to the issue, while the Bankruptcy Code determines if those property rights are included in the Debtor's estate.

11 U.S.C. §541(a)(1) sets out what is property of the Debtor's

bankruptcy estate. (§542(a)(2) relates only to community property which is not applicable here). That section provides as follows:

> (a) The commencement of a case section 301, 302 or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) *Except as provided in subsections (b) and (c)(2)* of this section, *all legal or equitable* interests of the debtor in property as of the commencement of the case. (Emphasis added).

11 U.S.C. §541(c) provides as follows:

> (c)(1) *Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2),* or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—
>
> (A) *that restricts or conditions transfer of such interest by the debtor;* or
>
> (B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.
>
> (2) *A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.* (Emphasis supplied).

Indiana Code 27-1-5-1 relating to Annuity Contracts provides as follows:

> Sec. 1. *No person entitled to receive benefits under* a life insurance or life *annuity contract*, or under a written agreement supplemental thereto, *issued by domestic life*

> *insurance company, shall be permitted to commute, anticipate, encumber, alienate, or assign such benefits, if the right to do so is expressly prohibited or withheld by a provision contained in such contract or supplemental agreement.* And, if such contract, policy or supplemental agreement so provides, such benefits, except when payable to the person who provided the consideration for such contract, shall not be subject to such persons' debts, contracts, or engagements, nor to any judicial process to levy upon or attach the same for payment thereof. (Emphasis added).

It is noted that although the Debtor sets out the annuity contracts as exempt under I.C. 27-2-5-1 in Schedule B-4, this provision is not truly an exemption statute, it is a statute which validates an anti-assignment or spendthrift provision in a life insurance or life annuity contract.

Indiana Code 30-4-3-2 as part of the Indiana Trust Code provides as follows:

> Sec. 2. (a) The settlor may provide in the terms of the trust that the interest of a beneficiary may not be either voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee.
>
> (b) Except as otherwise provided in subsection (c), if the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of his beneficial interest will not prevent his creditors from satisfying claims from his interest in the trust estate.
>
> (c) Subsection (a) applies to a trust that meets both of the following requirements, regardless of whether or not the settlor is also a beneficiary of the trust:
>
> (1) The trust is a qualified trust under 26 U.S.C. 401(a).
>
> (2) The limitations on each beneficiary's control over the beneficiary's interest in the trust complies with 29 U.S.C. 1056(d).

(d) A trust containing terms authorized under subsection (a) may be referred to wherever appropriate as a trust with protective provisions.[2]

Indiana Code 30-4-1-1 defines a "Trust", the relationships excluded from the Indiana Trust Code, and discusses the transferability of an employee benefit trust. That section provides as follows:

Sec. 1 (a) A trust is a fiduciary relationship between a person who, as trustee, holds title to property and another person for whom, as beneficiary, the title is held.

(b) Subject to IC 30-4-2-8, the same person may be both the trustee and a beneficiary.

(c) The rules of law contained in this article do not apply to:

(1) trusts created by operation of law;

(2) business trusts (as defined in IC 23-5-1);

(3) security instruments and creditor arrangements;

(4) voting trusts;

(5) religious, educational, and cultural institutions, except with respect to IC 30-4-5, as it relates to the maintenance of federal income tax exemption privileges;

(6) nonprofit charitable foundations, corporations, and other associations, except with respect to IC 30-4-5 as it relates to the maintenance of federal income tax exemption privileges;

(7) prepaid funeral plans;

(8) trusts for the care and upkeep of cemeteries;

[2]I.C. 30-4-3-2 was amended by P.L. 287-1987, SEC. 2, Emerg. Eff. April 30, 1987, which deleted a legislatively supplied section heading; inserted the introductory exception clause in subsection (b); and, inserted the present subsection (c).

(9) agreements to furnish funeral services; and

(10) trusts created or authorized by statute other than this article.

(d) IC 30-4-3-2(a) applies to an employee benefit trust that meets the requirements set forth in IC 30-4-3-2(c). However, no other provision of this article applies to an employee benefit trust.[3]

The initial issue is whether clauses 16 and 17 of the TIAA and clauses 16 and 17 of the CREF which are clearly spendthrift clauses pursuant to I.C. 27-2-5-1 operate to exclude the annuity contracts from the Debtor's bankruptcy estate pursuant to §541(a)(1) and (c)(2). It is noted that I.C. 27-2-5-1 is not an exemption statute, but a spendthrift statute.

An annuity is a right to payment of a specified sum of money at stated intervals. I.L.E. *Annuities* §1. Generally speaking, life insurance is a provision for death while an annuity is a provision for life. It is essentially a form of investment. Annuity agreements create only the relation of debtor and creditor, not a trust. *Chatam County Hospital Authority v. John Hancock Mutual Life Ins. Co.*, 325 F. Supp. 614 (S.D. Ga. 1971) , *citing*, *Hughes v. Sun Life Assurance Co. of Canada*, 159 F.2d 110 (7th Cir.). It is a mere chose in action for the payment of money. *See* 4 Am. Jur.2d *Annuities*, §4 and n. 17 and cases cited therein.

Although the manner in which the annuity was created was different in the case of *Matter of Brown*, 86 B.R. 944 (N.D. Ind. 1988), the legal principles applicable there are fully applicable to the case at bar. In *Brown*, the debtors prior to filing bankruptcy had won an Arizona lottery and after an initial distribution of $39,500.00 was to receive the balance by annuity payable by John Hancock Mutual Life Insurance Company at $1,000.00

[3]I.C. 30-4-1-1 was amended by P.L. 287-1987, SEC. 1, Emerg. Eff., April 30, 1987, which deleted a legislatively supplied section heading; rewrote subsection (c); and, added subsection (d).

a week for 948 weeks. The annuity contract contained an exhaustive anti-alienation clause. The *Brown* court held as follows:

> Eleven U.S.C. §541 is a broadly inclusive statute defining property of a bankruptcy estate. The scope of §541(a) is particularly "broad and all embracing." *In re Miller*, 16 B.R. 790, 791 (Bkrtcy. D. Md. 1982). But for a specific, narrowly construed exception set forth in §541(c)(2), an interest of a debtor will become property of the bankruptcy estate despite any agreement to the contrary which attempts to restrict transfer. 11 U.S.C. §541(c)(1)(A).
>
> Under subsection (2), however, "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. §541(c)(2). The law is clear that this provision was intended by Congress to specifically preserve "restrictions on transfer of a spendthrift trust." *In re Miller* at 791, quoting H. Rep. No. 95-595, 95th Cong., 1st Sess. 369 (1977); S. Rep. No. 95-989, 95th Cong., 2nd Sess. 83 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5869, 6325. *See also* Ind. Code 30-4-3-2; *Matter of Cook*, 43 B.R. 996 (N.D. Ind. 1984).
>
> As a general rule, a beneficiary's interest in a spendthrift trust is excluded from his bankruptcy estate if state law and the trust so provide. Bankr. Code, 11 U.S.C.A. §541(c)(2); *Matter of Moody*, 837 F.2d 719 (5th Cir. 1988); *Matter of Goff*, 706 F.2d 574, 580 (5th Cir. 1983). The Indiana Code and Indiana cases recognize and clearly define a spendthrift trust and its requirements.
>
> Pursuant to Ind. Code 30-4-3-2, a settlor may provide in the terms of a trust that the beneficiary's interest may neither voluntarily nor involuntarily be transferred before payment or delivery of the interest to the beneficiary. If the settlor is also a beneficiary of the trust, such a provision will not prevent creditors from satisfying claims from the beneficiary's interest in the trust estate. Ind.

Code 30-4-3-2(a)-(b). To qualify as a spendthrift trust, it must be shown that the settlor is not a beneficiary of the plan, that the plan contains an anti-alienation clause, and that debtor beneficiary has no present dominion or control over the plan corpus. *Matter of McVade*, 72 B.R. 560, 562 (Bkrtcy. N.D. Ind. 1987); *Matter of Cook*, 43 B.R. 996, 1001 (N.D. Ind. 1984); *Matter of Jones*, 43 B.R. 1002, 1006 (N.D. Ind. 1984).

Cook, *Jones* and *McVade* all involve the issue of whether an ERISA-qualified retirement plan meets the requirements of a spendthrift trust. It is evident from these and other similar cases, that retirement plans will be examined by the courts on a case by case basis. Some will be seen as spendthrift trusts and others will not, with the key element being that of the beneficiary's access to the funds. A recent amendment to §30-4-3-2 provides some support for the position that a retirement plan meeting specific requirements might in some limited circumstances qualify as a spendthrift trust. *See*, Ind. Code 30-4-3-2(c). Again, the key factor appears to be the accessibility of the funds.

* * * *

The annuity agreement in this case is a contract between an Indiana resident and the Arizona Lottery Commission. Its purpose is to specify a method of payment for Arizona lottery winnings. In a sense, the agreement is the remaining portion of the prize itself. As such, its enforcement might well be shunned by Indiana courts, unlike the agreement in *Kaszuba*. Enforcement is, however, not the issue here. In fact, there is no element of contingency involved with respect to the debtors' receipt of at least $4,000.00 per month of unearned monies. (For a discussion of contingency, *see In the Matter of Xonics Photochemical, Inc.*, 841 F.2d 198 (7th Cir. 1988)). The debtors' weekly payments are here assured by a contractual agreement that is presumed to be legally enforceable, at least in Arizona. For purposes of the underlying bankruptcy, as correctly determined by the bankruptcy court, the agreement represents a contractual interest of the

debtor, rightfully considered part of the bankruptcy estate.

* * * *

The weekly annuity payments should be, and are as a matter of law and policy, included in the bankruptcy estate. See, In re Koonce, 54 B.R. 643 (Bkrtcy. D.S.C. 1985) and *In re Miller*, 16 B.R. 790 (Bkrtcy. D. Md. 1982), both finding lottery winnings not to qualify as excludable from the bankruptcy estate.

As a final matter, the debtors' assertion that the annuity contract is excludable by way of Ind. Code 27-2-5-1, which provides that benefits from a life annuity contract will be inalienable if so specified in an annuity contract, is without merit. A spendthrift provision enforceable in bankruptcy court must be contained in a trust. The agreement here is a contract. An approach similar to that of the debtors was specifically rejected in *In re Power*, 115 F.2d 69 (7th Cir, 1940). *See also*, *Miller* at 791. The court's comments in *Miller* apply and bear repeating here:

It is beyond question that the Debtor's interest, albeit in some respects a future interest, in the lottery winnings became property of the estate upon the filing of his petition for relief under Chapter 7 of the Bankruptcy Code. The scope of §541(a) is broad and all embracing. *In re Ford*, 3 B.R. 559, 568-70 (Bkrtcy., D. Md. 1980), *aff'd per curiam sub nom Greenblatt v. Ford*, , 638 F.2d 14 (4th Cir. 1981). *Cf. In re Ryan*, 15 B.R. 514 Bankr. L. Rep. (CCH) para. 68,466 (Bkrtcy., D. Md. 1981). The Court is unconvinced that lottery winnings payable pursuant to an annuity contract are subject to a "restriction on the transfer of a beneficial interest of the debtor in a trust" within the meaning of the §541(c)(2) limitation of the scope of §541(a). Congress intended §541(c)(2) to preserve "restrictions on transfer of a spendthrift trust." H. R. Rep. No. 95-595, 95th Cong., 1st Sess. 369 (1977); S. Rep. No. 95-989, 95th Cong., 2nd Sess. 83 (1978), U.S. Code Cong. & Admin. News 1978, p. 5787. Thus, the Debtor's interest in the lottery winnings are property of the estate subject to any valid exemption.

Id. at 946-948.

The fact that the annuity contract was funded by contributions by the Debtor's employer rather than by lottery winnings does not change the legal nature of the instruments they are still contracts and not trusts, and thus do not fall within the scope of I.C. 30-4-3-1 and 2, and in turn §541(c)(2). Indiana Code 27-2-5-1 and the anti-alienation clauses in the annuity contracts protects the debtor outside of bankruptcy, but does not prevent the inclusion of the same contracts from being included in the debtor's estate pursuant to §541(a)(1).

In the case of *In re Power*, 115 F.2d 69 (7th Cir. 1940), the Debtor claimed as an exempt asset of his bankruptcy estate an annuity contract purchased by him in 1928 from Aetna Life Insurance Company. The Annuity contract provided as follows:

> 1. That the annuity contract was issued in consideration for a single payment of $19,954.00.
>
> 2. Aetna was to pay $100.00 for 204 months and if the Debtor or his wife should be alive on April 28, 1942, Aetna was obligated to continue monthly payments during the lifetime of both or either and then terminate.
>
> 3. That neither the Debtor nor the wife nor any beneficiary under the contract had the right to transfer, assign, or to anticipate his or her right to the annuity payments hereunder.

The Court held that the annuity contract was not exempt property under the provisions of §2-3501 of Burn's Indiana Statutes of 1933 as amended by Acts of 1937 C. 296, 1. That exemption statute granted the following exemptions:

> (a) Real estate, or estates or rights therein or thereto of the value of not more than seven hundred dollars [$700].
>
> (b) Tangible personal property to the value of six hundred dollars [$600].
>
> (c) Intangible personal property, including choses in action, profits, debts owing, and income owing, to the value of fifteen dollars ($15.00).

> (d) Income or profits of whatever nature of not more then fifteen collars [$15.00] per week. If such income and profits shall exceed the sum of fifteen dollars [$15.00] per week, then ninety [90] percentum of such income and profits in excess of said sum of fifteen dollars [$15.00] per week shall be exempt and ten [10] percentum thereof shall be subject to execution, provided, however, that none of the foregoing provisions of this act shall apply to any judgment obtained prior to July 1, 1937.

This is the predecessor to the present I.C. 34-1-28-1 which is applicable to the case at bar.

The Court concluded that the payment of $100.00 a month was not income or profit within the meaning of paragraph (d) of the exemption statute as then constituted, but was the payment under a contract where for a gross sum paid the company it became liable to pay certain sums annually during the life of the annuitant. The Court further concluded that since the right to receive the payment was purchased, and paid for prior to the adjudication in bankruptcy, the payments were essentially repayments in installments of the sum with which the annuity was purchased, *citing*, *Legg v. St. John*, 296 U.S. 489, 297 U.S. 695, 56 S. Ct. 336, 80 L. Ed.2d 345 (1936), and *Moskowitz v. Parrs*, 68 F.2d 618 (6th Cir.).

Finally, the *Power* court concluded that the exemption would be limited to any payments due when the petition was filed and the language of the contract cannot be construed to exempt payments due after the filing of the bankruptcy petition and continuing during the life of the annuitant.

Accordingly, the Court concludes that §541(c)(2) does not apply in this case and the annuity contracts are property of the Debtor's estate.

The only issue remaining is the fact that the Debtor has no right to payment under the annuity contracts until he retires and even upon reaching retirement age he may postpone the start of annuity payments by continuing employment at an institution that has a TIAA or CREF retirement or tax deferred annuity plan.

We believe that *In re Ryerson*, 739 F.2d 1423 (9th Cir. 1984) correctly analyzed such a situation. There the debtor became entitled to certain money under a prepetition appointment agreement. In the event of cancellation or other termination of the appointment, the Company could at their option pay to the debtor the contract value of the agreement. The debtor terminated employment approximately eight months after he filed his petition and the contract value was due at that time. The Debtor argued that the sum was not included in his estate as the contract had not been terminated or cancelled on the date of his petition, and thus had no "contract value" as it was a nontransferable, contingent interest. The *Ryerson* Court stated as follows:

> Under the Act, a contingent interest in personal property passed to the trustee only if it was capable of being assigned or was subject to execution, seizure, or sequestration. 4 A. *Collier on Bankruptcy* para. 70.37 at 453 (14th ed. 1978). However, the requirement that the debtor must be able to transfer the interest or that his creditors by some means must be able to reach it has been eliminated under the Code. 4 *id.* para. 541.08[1] (15th ed. 1984). By including all legal interest without exception, congress indicated its intention to include all legally recognizable interests although they may be contingent and not subject to possession until some future time. H.R. Rep. No. 595, 95th Cong., 1st Sess. 175-76 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6136. We therefore conclude that Ryerson's interest in the "contract value," albeit contingent at the time of filing and not payable until such time as his appointment is terminated or cancelled, is includable within the bankruptcy estate pursuant to section 541(a)(1).
>
> Having concluded that Ryerson's right to "contract value" is property of the bankruptcy estate, we have no difficulty concluding that any payments paid upon termination of Ryerson's appointment are also property of the bankruptcy estate although paid after commencement of the case, at least to the extent the payments are related to prebankruptcy services. Section §541(a)(6) of the Code includes in the bankruptcy estate after-acquired property

> consisting of "[p]roceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case." 11 U.S.C. §541(a)(6). It follows therefore that earnings from services performed prior to bankruptcy are includable within the bankruptcy estate. Under the Act, the test was whether the after-acquired property was "sufficiently rooted in the prebankruptcy past and so little entangled in the debtor's ability to make a fresh start that it should not be excluded from property of the estate." *Segal v. Rochelle*, 382 U.S. 375, 380, 86 S. Ct. 511, 515, 15 L. Ed.2d 428 (1966). The Code follows *Segal* insofar as it includes after-acquired property "sufficiently rooted in the prebankruptcy past" but eliminates the requirement that it not be entangled with the debtor's ability to make a fresh start. *See* S. Rep. No. 989, *supra* at 82, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5868. We think that the termination payments representing value for years of service completed prior to bankruptcy, and not being an arbitrary amount arising after bankruptcy, are "sufficiently rooted in the pre-bankruptcy past" as to be included within the bankruptcy estate. *See In re Durham*, 272 F.Supp. 205, 209 (S.D. Ill. 1967).

Id. at 1425-1426.

Thus, the contract value of these annuity contracts become part of the Debtor's estate to the extent of prepetition contributions made thereunder as of the date of the Debtor's petition, though contingent and not payable at this time. *Cf. In re Hammond*, 9 C.B.C.2d 830 (Bankr. W.D. Okla. 1983), where the Court held that where a debtor enters into a contract prior to the filing of a chapter 11, and will receive annual payments as consideration for a noncompetitive clause, such future annual installment payments are not property of the estate since the debtor has not done all the acts necessary to accrue his right to future payments, and the debtor would not perform a service sufficiently rooted in his prebankruptcy past, so as to render the payments property of the estate. In the case at bar, the

prepetition contribution made by the Debtor's employer pursuant to the annuity contracts were solely in consideration for the rendering of prepetition services to the Debtor's employer, and clearly are rooted in his prebankruptcy past.

As noted by the Court in *Anderson v. St. Paul Indemnity Co.*, 340 F.2d 406 (7th Cir. 1965) (an act case), any asset or chose in action of the bankrupt that could have been enforced by the bankrupt had he not gone into bankruptcy automatically vests in and becomes property of the trustee. (upholding right of trustee to sue the Debtor's insurance company for negligence, bad faith, and willfulness and gross negligence in failing to settle an insurance claim.)

The only exemption that is allowable on these annuity contracts is that of $100.00 as an intangible personal property right pursuant to I.C. 34-2-28-1(a)(3). *See e.g. Matter of Jones*, 768 F.2d 923 (7th Cir. 1985).

It is therefore,

ORDERED, ADJUDGED AND DECREED that the objections to claimed exemptions of the Debtor are hereby sustained, and that said annuity contracts are property of the Debtor's estate pursuant to 11 U.S.C. §541(a)(1).

DATED:

(EOD 07-10-89)

JUDGE, U.S. BANKRUPTCY COURT

Distribution

Debtor, Raymond Morter, PO box 2292, W. Lafayette, IN 47906

Atty. for Debtor, Carolyn Holder, 700 Bank One Bldg., PO Box 757, Lafayette, IN 47902

Chet Zawalich, 725 Trustcorp Bldg., South Bend, IN 46601

U.S. Trustee

Edward Chosnek, PO box 708, Lafayette, IN 47902

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

JUDGMENT IN A CIVIL CASE
CASE NUMBER: L89-62

RAYMOND LIONE MORTER
d/b/a SWINENGINEERING, INC.

v.

FARM CREDIT SERVICES

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this court having found the CREF component of Morter's retirement plan excluded from the bankruptcy estate pursuant to §541(c)(2), the judgment of the Bankruptcy Court is hereby VACATED in part and AFFIRMED in part. The case is REMANDED for a determination of the value of the TIAA plan. In addition, Morter asks this court to find the TIAA plan exempt from the bankruptcy estate pursuant to Indiana or other applicable state law. On this issue, the Bankruptcy Court correctly applied Indiana law and properly determined the only allowable exemption on the annuity contract is the $00 intangible personal property exemption pursuant to I.C. 34-2-28-1(a)(3).

February 8, 1990
Date

Richard R. Timmons
Clerk

Connie Sue Inman
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
LAFAYETTE DIVISION

RAYMOND LIONE MORTER d/b/a SWINENGINEERING, INC.,	)	
Plaintiff	)	
v.	)	Civil No. L89-62
FARM CREDIT SERVICES,	)	
Defendant	)	

MEMORANDUM OPINION AND ORDER

Raymond Lione Morter is a professor of veterinary science at Purdue University. Morter has served the university as a faculty member for thirty of his 69 years. He faces mandatory retirement when he turns 70 this fall. Though approaching his "golden years" both professionally and chronologically, Morter recently filed a petition for relief under Chapter 7 of the United States Bankruptcy Code. Chapter 7 liquidation is a remedy through which the debtor, in effect, surrenders his non-exempt assets pro rata to his creditors and seeks the relief of a discharge.

An educator at the college level for most of his adult life, Morter holds an interest in two retirement annuities identified as the Teacher's Insurance and Annuity Association (TIAA) and the College Retirement Equity Fund (CREF). Purdue University, as Morter's employer, has paid the entire cost of his participation in the TIAA-CREF plans. A plan participant may voluntarily make additional payments to his retirement fund, but Morter has not done so. Upon his retirement, Morter will receive a periodic stream of income until he dies. The annuities do not provide for loans or have cash surrender value, and the right to receive income may not be

pledged or assigned.[1] Morter argues the annuities (the combined value of which exceeds $280,000) are exempt property under relevant law and thus not part of the bankruptcy estate reachable by his creditors.

The Bankruptcy Court, applying Indiana law, held the only allowable exemption on the annuity contracts was the $100 intangible personal property right pursuant to I.C. 34-2-28-1(a)(3). Morter appeals that determination and presents two issues for this court's review: 1) whether the TIAA-CREF annuities are excludable from the bankruptcy estate under 11 U.S.C. §541(c)(2) and 2) whether the retirement plan annuities are exempt from the bankruptcy estate pursuant to Indiana or other applicable state law.

28 U.S.C. §158(a) confers jurisdiction in the district court to hear this appeal, taken pursuant to Bankruptcy Rule 8001(a), from the Bankruptcy Court's final judgment.

I. Standard of Review

Rule 8013 of the Federal Rules of Bankruptcy Procedure governs the pertinent standard of review. In an appeal from a bankruptcy court's decision, a district court applies two standards of review: one for findings of fact; the other for conclusions of law. *Matter of Busick*, 65 B.R. 630, 632 (N.D. Ind. 1986). When the appellant alleges errors of fact, Rule 8013 dictates that "findings of fact shall not be set aside (by the district court) unless clearly erroneous." *See also In re Kimzey*, 761 F.2d 421, 423 (7th Cir. 1985). A finding is clearly erroneous when, "although there is

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[1]Paragraph 16 of the TIAA specimen contract provides: "Any assignment or pledge of this contract or any benefit hereunder will be void and of no effect." Paragraph 17 provides:

> The benefits, options, rights, and privileges accruing to any Beneficiary will not be transferable or subject to surrender, commutation, or anticipation, except as may be otherwise endorsed on this contract. To the extent permitted by law, annuity and other benefit payments will not be subject to the claims of any creditor of any Beneficiary or to execution or to legal process.

The CREF specimen contract contains similar provisions.

evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985).

The relevant standard of review for conclusions of law also is governed by Rule 8013, which provides the district court with the discretion to "affirm, modify, or reverse" the bankruptcy court's legal conclusions. *See also Matter of Evanston Motor Co.*, 735 F.2d 1029, 1031 (7th Cir. 1984). When a bankruptcy judge's conclusions are challenged, the district court must make a de novo review and may overturn the findings if they are contrary to law. *Busick*, 65 B.R. at 632.

Having found the Bankruptcy Court's factual findings not clearly erroneous, this court proceeds to review independently the Bankruptcy Court's conclusions of law.

II. Legal Conclusions and Discussion

Raymond Morter filed a Chapter 7 bankruptcy petition in June of 1986 and, in so doing, created a bankruptcy estate. Generally, a bankruptcy estate consists of "all legal and equitable interests of the debtor in property as of the commencement date." 11 U.S.C. §541(a)(1). The only relevant exception for purposes of this review is found at 11 U.S.C. §541(c)(2). This section provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable under this title." 11 U.S.C. §541(c)(2). Thus, if state law prevents a creditor from reaching income payable at a future date (as when the debtor is the beneficiary of a spendthrift trust), then the Bankruptcy Code will similarly treat that right to receive future income as outside the bankruptcy estate and likewise unreachable by creditors.

The legislative history to §541(c)(2) unambiguously indicates this provision was designed to preserve the restrictions on spendthrift trusts. H.R. Rep. No. 595, 95th Cong., 1st Sess. 369 (1977) ("Paragraph (2) of subsection (c) . . . preserves restrictions on

transfer of a spendthrift trust to the extent that the restriction is enforceable under applicable nonbankruptcy law."); S. Rep. No. 989, 95th Cong., 2d Sess. 83 (1978) ("Paragraph (2) of subsection (c) . . . preserves restrictions on a transfer of a spendthrift trust that the restriction is enforceable nonbankruptcy law to the extent of the income reasonably necessary for the support of a debtor and his dependents."). What remains unclear is whether §541(c)(2) excludes from the bankruptcy estate only traditional spendthrift trusts, or whether Congress also intended to exclude other "arrangements"[2] that exhibit the characteristics of a spendthrift trust.

Other circuits addressing this question have generally taken the conservative view that Congress intended to exclude from the bankruptcy estate only traditional spendthrift trusts as they are defined under applicable nonbankruptcy law. *See, e.g., In re Swanson*, 873 F.2d 1121, 1123 (8th Cir. 1989) (" 'Congress only intended by §541(c)(2) to preserve the status of traditional spendthrift trusts, as recognized by state law . . . .' ") *quoting In re Graham*, 726 F.2d 1268, 1271 (8th Cir. 1984); *In re Lichstrahl*, 750 F.2d 1488, 1490 (11th Cir. 1985) ("'[A]pplicable nonbankruptcy law' refers only to state spendthrift law. Therefore, . . . pension plans . . . are excluded pursuant to section 541 (c)(2) only if they are enforceable under state law as spendthrift trusts."); *Matter of Goff*, 706 F.2d 574, 580 (5th Cir. 1983) ("Congress intended to exclude only trust funds in the nature of 'spendthrift trusts' from the property of the estate."). *But see McLean v. Central States, Southwest Areas Pension Fund*, 762 F.2d 1204, 1985) ("Nowhere in the statute [§541(c)(2)] is there a requirement that the trust be 'traditional,' nor is there any definition of what might be found to constitute a 'traditional' trust."). While the statutory language of §541(c)(2) does not expressly limit the exclusion solely to spendthrift trusts, the court finds the legislative history and the cited circuit opinions to be persuasive authority for the narrower con-

[2]Such as ERISA-qualified plans. For a listing of Employee Retirement Income Security Act qualifications, see generally 29 U.S.C. §1056 and 26 U.S.C. §401.

struction urged by the trustee and Farm Credit Services. Accordingly, the court holds that, for the TIAA-CREF plans to be excluded from Morter's bankruptcy estate under §541(c)(2), they must be spendthrift trusts under applicable nonbankruptcy law.

Paragraph 20 of the TIAA specimen contract provides in relevant part: "This contract is made and delivered and is to be performed in the State of New York. It is to be governed as to its validity and effect by the laws there in force, with reference to which it is made." Paragraph 20 of the CREF specimen contract reads almost verbatim in specifying that the laws of the State of New York are to govern the contract's validity and effect. Because Morter and TIAA/CREF expressly have provided that New York law will govern their contracts, the court finds New York's spendthrift trust law to be the "applicable nonbankruptcy law." This holding is consonant with other courts that have addressed the issue. *See, e.g., In re Montgomery*, 104 B.R. 112, 115 (Bankr. N.D. Iowa 1989) ("New York law governs the effect and validity of the TIAA/CREF annuities . . . ."); *In re Braden*, 69 B.R. 93, 94 (Bankr. E.D. Mich. 1987) ("[A]pplicable non-bankruptcy law" . . . is the law of the State of New York . . . ."). Accordingly, if the TIAA/CREF plans qualify under New York law as spendthrift trusts, then the plans are excluded from Morter's bankruptcy estate under §541(c)(2); if the plans are not spendthrift trusts under New York law, then they are considered property of the estate pursuant to §541(a).

The above-cited bankruptcy cases (*Montgomery* and *Braden*) also grappled with New York's treatment of the TIAA/CREF retirement plans. In each case, the court excluded the plans from the bankruptcy estate after finding them enforceable under applicable state law. But only the *Montgomery* court specifically found the pension plans to constitute a valid spendthrift trust under nonbankruptcy law. *Montgomery* 104 B.R. at 116 ("The law of the State of New York fully supports the contention that the annuity plan is a spendthrift trust under 'applicable nonbankruptcy law.'"). The *Braden* court seemed to apply the more liberal standard of not requiring the pension plans to constitute a

traditional spendthrift trust under applicable law.[3] Because this court has adopted the conservative construction of §541(c)(2), *Braden's* reasoning is inapposite to this appeal. The court proceeds to characterize the TIAA/CREF plans under New York law.

Montgomery cited a pair of New York cases (*Matter of Aurora G. v. Harold Aaron G.*, 98 Misc.2d 695, 414 N.Y.S.2d 632 (1979) and *Alexandre v. Chase Manhattan Bank, N.A.*, 61 A.D.2d 537, 403 N.Y.S.2d 21 (1978)) for the proposition that New York law regards the TIAA/CREF plans as spendthrift trusts.[4] In *Alexandre* the court prevented a judgment creditor from reaching her exhusband's TIAA/CREF pension funds. The debtor's only interest in the funds was a contingent interest that would pay him a monthly amount only if he were alive. Further, the court noted the annuity contract's provisions were consistent with the CREF enabling statute that placed beyond a creditor's reach the annuitant's interest in a CREF program. In *Aurora* the court (citing *Alexandre*) likewise found the debtor's contingent interest in the CREF program to be unreachable. However, the court determined the TIAA proceeds could be sequestered because payments had already begun under the TIAA annuity; thus, the debtor's interest in the TIAA fund was no longer contingent. While *Aurora* and *Alexandre* recognize the spendthrift-like qualities of the TIAA/CREF plans, this court does not view those cases as standing for the broad rule that *Montgomery* announced — that the TIAA/CREF plans are spendthrift trusts under New York law.

The New York Legislature has not been silent on the issue of spendthrift trusts. Under New York law all express trusts are presumed to be spendthrift unless the settlor expressly provides otherwise. N.Y. Est. Powers & Trusts Law §7-1.5(a)(1) (McKin-

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[3]*Braden* seemed to require only that the plans be enforceable under New York law, not that they constitute valid spendthrift trusts. *See Braden*, 69 B.R. at 94 ("The Court concludes that these (plan) restrictions would be completely enforceable under applicable non-bankruptcy law.").

[4]*Montgomery* acknowledged, however, that neither court specifically used the term "spendthrift trust" in its opinion.

ney 1981-82 Supp.), *cited in Regan v. Ross*, 691 F.2d 81, 86 n.14 (2d Cir. 1982). To constitute an express trust of personal property, there are four essential elements: (1) a designated beneficiary; (2) a designated trustee who is not the beneficiary; (3) a fund or other identifiable property; and (4) the actual delivery of the fund or other property to the trustee with the intention of passing legal title thereto to him as trustee. *Matter of Fontanella*, 33 A.D.2d 29, 304 N.Y.S.2d 829 (1969). In addition, while "no particular formula of words is required to accomplish [a trust] . . . . , the words and acts relied upon must be unequivocal in nature and admit of no other interpretation than that the property is held in trust" (citations omitted). *Id.*

In this court's view, while both the TIAA and CREF annuity contracts satisfy the four essential elements of an express trust, only the CREF contract is so "unequivocal in nature" as to lead this court inexorably to the conclusion that the formation of a trust was the object of the parties' agreement. New York cases have long held that the difference between annuities and trusts for the payment of income to a beneficiary is substantial (citations omitted). *See, e.g., Petition of Tomasetti*, 147 N.Y.S.2d 885, 886 (N.Y. Sur. 1955).

> The primary distinction between an annuity and a trust is that an annuity confers upon the beneficiary a right to a fixed and certain sum of money, whereas a trust confers upon a beneficiary an indefinite and uncertain sum of money based upon actual income. . . . [W]here there is no provision for invasion of principal, the Courts have held that a trust rather than an annuity has been created (citations omitted).

In re Folsom's will, 155 N.Y.S.2d 140, 148 (N.Y. Sur. 1956), *aff'd* 6 A.D.2d 691, 174 N.Y.S.2d 116 (N.Y.A.D. 1958), *aff'd sub. nom. In re Folsom's Estate*, 6 N.Y.2d 886, 190 N.Y.S.2d 381, 160 N.E.2d 857 (N.Y. 1959).

The CREF contract provides: "The amount of dollars payable will fluctuate in accordance with the current value of an Annuity Unit, which will change primarily with changes in the value of the common stocks and other assets of CREF. *No guarantee of dollar*

amounts is provided. . ." (emphasis added). A CREF annuitant is not guaranteed a fixed dollar amount but a variable share of the portfolio's return, depending upon the annuitant's actuarial circumstances. Accordingly, the court finds the CREF annuity contract to constitute an express trust under New York law; indeed, pursuant to EPTL §7-1.5(a)(1), this express trust is a spendthrift trust, the settlor not having provided otherwise.

The TIAA contract is not a trust, however. Annuity benefits under TIAA are determined by an elaborate Rate Schedule, which considers an annuitant's age, gender, and other significant actuarial factors. TIAA reserves the right to update a Rate Schedule as provided in Paragraph 12. Paragraph 12 provides: "TIAA may, at any time and from time to time, substitute a new Rate Schedule applicable to all retirement annuity contracts of this form, in lieu of the Rate Schedule then in effect. . . . The new Rate Schedule will apply *only to those premiums that fall due on or after the effective date of the new Rate Schedule* . . . (emphasis added)." In other words, when an annuitant purchase[5] a fully paid portion of a life annuity, the rates then in effect will forever determine the income payable to the annuitant as to that fully paid portion. The annuitant is guaranteed a fixed, predetermined income from such fully paid portions, irrespective of the portfolio's later returns. Thus, if the fund's earnings in a given year were inadequate to pay all its annuity obligations, the shortfall would have to paid out of the fund's principal. The above case law dictates this benefit scheme characterizes an annuity, not a trust.

Accordingly, this court having found the CREF component of Morter's retirement plan excluded from the bankruptcy estate pursuant to §541(c)(2), the judgment of the Bankruptcy Court is hereby VACATED in part and AFFIRMED in part. The case is REMANDED for a determination of the value of the TIAA plan. In addition, Morter asks this court to find the TIAA plan exempt from the bankruptcy estate pursuant to Indiana or other applicable state law. On this issue, the Bankruptcy Court correctly

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[5]by paying the premium then due

applied Indiana law and properly determined the only allowable exemption on the annuity contract is the $100 intangible personal property exemption pursuant to I.C. 34-2-28-1(a)(3). IT IS SO ORDERED.

DATED: February 6, 1990.

Allen Sharp

CHIEF JUDGE
NORTHERN DISTRICT OF
INDIANA

cc: Holder/Justice
Opperman
Zawalich
Chosnek
J. Lindquist

In The
United States Court of Appeals
For the Seventh Circuit

No. 90-1534

RAYMOND LIONE MORTER,
aka d/b/a SWINENGINEERING, INC.,

Debtor-Appellant,

v.

FARM CREDIT SERVICES,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
Civil No. L89-62 — **Allen Sharp,** *Chief Judge.*

ARGUED DECEMBER 12, 1990 — DECIDED JULY 16, 1991

Before BAUER, *Chief Judge*, FLAUM and KANNE, *Circuit Judges.*

BAUER, *Chief Judge.* Raymond Lione Morter served as a professor of veterinary science at Purdue University for more than thirty years. He was forced to retire at age seventy in the fall of 1990 because of Purdue's mandatory retirement policy. As a condition of his employment at Purdue, Morter was required to participate in Purdue University's retirement plan, the Teacher's Insurance and Annuity Association of America/College Retirement and Equity Fund ("TIAA-CREF"). Although a participant may make voluntary payments to the plan, Morter chose not to do so; Purdue paid all preretirement contributions on his behalf.

The retirement plan in question -- TIAA-CREF — provides funding for the retirement programs of over half a million employ-

ees in over 3000 colleges and universities. *See generally Peters v. Wayne State University*, 476 F. Supp. 1343, 1346 (E.D. Mich. 1979), *rev'd*, 691 F.2d 235 (6th Cir. 1982). The TIAA component of the plan is a nonprofit, legal reserve life insurance policy that promises to pay a fixed annuity for life based on a contractually guaranteed rate of return, plus dividends, when a beneficiary reaches retirement age. When a participant retires, TIAA applies preretirement contributions to purchase a fixed annuity contract for the participant's benefit. TIAA places the preretirement accumulations in the payout annuity pool. The plan then evaluates the participant's life expectancy and calculates benefits for him. The plan adjusts the benefits of all other participants in the annuity pool based on that expectancy. If the participant dies before the time projected, the other participants in the pool will have more funds available to them. If the participant outlives TIAA's projection, the contributions of the other participants to the annuity pool will be used to continue the contractually guaranteed benefits and dividends as declared. Annuity income begins not later than April 1 of the calendar year following the year in which an annuitant attains the age of 70½ years.

CREF is a companion nonprofit corporation created to invest in financial instruments other than those traditionally permitted for fixed annuity funds like TIAA. Unlike TIAA, CREF provides an annuity that varies with the success of its investments.

The strict anti-assignment provision of TIAA-CREF makes it impossible for annuitants to reach the funds in their accounts before retirement. *See Connick v. Teachers Insurance and Annuity*, 784 F.2d 1018, 1021 (9th Cir.) (annuitant may not reach assets of TIAA-CREF plan until retirement, and then only as set forth in the plan), *cert. denied*, 479 U.S. 822 (1986). The TIAA and CREF contracts state that the plan makes "no provision for cash surrender or loans and cannot be assigned." The TIAA contract specifically provides:

> 16. *No assignment.* Any assignment or pledge of this contract or of any benefit hereunder will be void and of no effect.
>
> 17. *Protection Against Claims of Creditors.* The benefits, options, rights, and privileges accruing to any Beneficiary will not be transferable or subject to surrender, commuta-

> tion, or anticipation, except as may be otherwise endorsed on this contract. To the extent permitted by law, annuity and other benefit payments will not be subject to claims of any creditor of any Beneficiary or to execution or to legal process.

Clause 17 of the CREF contract contains similar language protecting benefits against the claims of creditors. Pursuant to these provisions, Morter had no access to the accumulation of assets in the TIAA-CREF retirement plan short of retirement or death.

In June 1986, Morter filed a voluntary petition for bankruptcy pursuant to Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§101-1330 (1978). A bankruptcy estate consists of "all legal and equitable interests of the debtor in property as of the commencement date." 11 U.S.C. §541(a)(1). Sections 522 and 541 of the Code permit a debtor to retain certain assets. In particular, section 541(c)(2) provides, "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under nonapplicable nonbankruptcy law is enforceable in a case under this title." Thus, if state law prevents a creditor from reaching certain income payable at a future date, then the Bankruptcy Code similarly will treat that income as outside the bankruptcy estate and unreachable by creditors.

On his schedule listing property exempt from the bankruptcy estate, Morter listed his interest in the TIAA-CREF retirement plan at $280,795.86. Both the Farm Services Credit of Madison, Wisconsin (d/b/a Product Credit Association and d/b/a The Federal Bank Association) and the United States Trustee objected to the claimed exclusion of the TIAA-CREF retirement plan, so the matter was submitted to the bankruptcy court for decision. On July 6, 1989, the court issued a Memorandum and Order sustaining the objections to Morter's claimed exemptions. The court ruled that the retirement plan was the property of the bankruptcy estate and that the only exemption Morter could take was a $100 intangible personal property right allowed by Indiana law. *See* Ind. Code §34-2-28-1(a)(3) (1980). On February 6, 1990, the district court issued a Memorandum Opinion and Order that

vacated in part and affirmed in part the judgment of the bankruptcy court. From that judgment, Morter brought a timely appeal.

State law determines whether access to a fund is sufficiently restricted to qualify for exclusion from the bankruptcy estate. The TIAA and CREF contracts expressly state that New York law governs their interpretation. Applying New York law, the district court concluded that the CREF component of the retirement plan was exempt from the bankruptcy estate, but that the TIAA component was not. *See Morter aka d/b/a Swinengineering, Inc. v. Farm Credit Services*, 110 B.R. 390, 393 (N.D. Ind. 1990). The basis for the dissimilar treatment was TIAA's provision of a fixed annuity that carried the possibility that the plan administrators might have to invade the corpus to pay the promised benefits if the fund suffered a shortfall in any given year. The district court characterized this benefit scheme as an annuity, not a trust. In contrast, CREF does not guarantee annuitants a fixed dollar amount but, rather, a variable share.

In order to decide whether TIAA-CREF was exempt from Morter's bankruptcy estate under section 541(c)(2) of the Bankruptcy Code, the district court examined in some detail the legislative history of the provision. The court determined that Congress intended to exclude from bankruptcy estates only "traditional" — i.e., donative — spendthrift trusts under applicable nonbankruptcy law. *See Morter*, 110 B.R. at 395. *See also* H.R. Rep. No. 95-595, 9th Cong., 1st Sess. 369, *reprinted in* 1978 U.S. Code & Admin. News 5963, 6325; S. Rep. No. 95-989, 95th Cong., 2d Sess. 83, *reprinted in* 1978 U.S. Code & Admin. News 5787, 5868. Characterizing a retirement plan as a spendthrift trust is simply another way of stating the conclusion that it must be excluded from the bankruptcy estate. A spendthrift trust is one "created to provide a fund for the maintenance of a beneficiary and at the same time to secure the fund against his improvidence or incapacity." *Black's Law Dictionary* 1400 (6th ed. 1990). The classic example of such an arrangement is the trust a parent might set up for an irresponsible child who might fritter away the funds

before reaching majority. Of critical importance, then, is whether a fund has access restrictions similar to those of a spendthrift trust, which "place the fund beyond the reach of the beneficiary's creditors, as well as . . . secure the fund against the beneficiary's own improvidence." *Matter of Goff*, 706 F.2d 574, 580 (5th Cir. 1983).

Morter believes that the district court over-emphasized the importance of the fact that TIAA someday might have to reach into its own funds. In this appeal, both he and *amicus curiae* TIAA-CREF argue that, in reviewing pension plans to determine whether they are included or excluded from the bankruptcy estate, courts properly should focus on whether the *debtor* has access to the funds. If, as here, the debtor's access is restricted by a ban on receiving any of the funds until retirement, a prohibition against lump sum distributions, and restrictions on alienation, the pension should be excluded from the bankruptcy estate.

Courts are split on the standards for determining whether a given set of restrictions on transfer and debtor access are sufficient to warrant the exclusion of a retirement or pension plan from a bankruptcy estate under 11 U.S.C. §541(c)(2). Some have held that the plan must constitute a traditional spendthrift trust under applicable state law. *See, e.g., In re Swanson*, 873 F.2d 1121, 1123 (8th Cir. 1989); *In re Lichstrahl*, 750 F.2d 1488, 1490 (11th Cir. 1985); *Goff*, 706 F.2d at 587. *Cf. In re Nadler*, 122 B.R. 162, 166 (Bankr. D. Mass. 1990) (section 541(c)(2) applies only "to the type of trust that traditionally has contained restrictions on assignments and not to trusts involving employee benefits"). Other courts have held that the plan need only exhibit the characteristics of a spendthrift trust under state law to be exempt. *See., e.g., McClean v. Central States, Southeast and Southwest Areas Pension Fund*, 762 F.2d 1204, 1207 n.1 (4th Cir. 1985) ("Nowhere in [§541(c)(2)] is there a requirement that the trust be 'traditional,' nor is there any definition of what might be found to constitute a 'traditional' trust."); *In re Atallah*, 95 B.R. 910, 919 (Bankr. E.D. Pa.

1989) ("Section 541(c)(2) is not limited to traditional spendthrift trusts, but also applies to pension funds which exhibit the characteristics of a spendthrift trust."); *In re Watkins*, 95 B.R. 483, 488 (W.D. Mich. 1988) (pension plan is enforceable under Michigan law as a spendthrift trust because it prohibits alienation of interest); *In re Hysick*, 90 B.R. 770, 775 (Bankr. E.D. Pa. 1988) (court must look at "a variety of factors"); *In re Pettit*, 61 B.R. 341, 346 (Bankr. W.D. Wash. 1986) ("The degree of control that the debtor may exercise over the trust assets is a crucial factor in determining the issue of inclusion in, or exclusion from, the bankruptcy estate."); *In re Threewitt*, 24 B.R. 927, 929 (D. Kan. 1982) ("relevant question is not whether the Plan looks like a good, old fashioned spendthrift trust"). *See also In re Vogel* 78 B.R. 192, 195 (Bankr. N.D. Ill. 1987); *In re Guernsey*, 54 B.R. 68, 69 (Bankr. S.D. Fla. 1985); *In re Kwaak*, 42 B.R. 599, 602 (Bankr. D. Me. 1984); *In re Phillips*, 34 B.R. 543, 546 (Bankr. S.D. Ohio 1983).

The collective wisdom of this second group of cases is persuasive: the plain language of section 541(c)(2) does not require that a retirement plan be a "traditional" spendthrift trust. We agree with the Fourth Circuit's reasoning in *McClean* that section 541(c)(2)

> should [not] be confined in its recognition of enforceable transfer restrictions to those found in "traditional" spendthrift trusts. The language of §541(c)(2) does not suggest such a limitation, and the legislative history reveals only that the provision has the unambiguous purpose of preserving enforceable transfer restrictions in spendthrift trusts. . . .

762 F.2d at 1207 n.1. Even in cases in which courts have included retirement plans within the bankruptcy estate, there has been a willingness to exclude the plan if it is employer-created and controlled and, therefore, analogous to a spendthrift trust. *See., e.g., Swanson*, 873 F.2d at 1124 (court indicated that the law creating a teacher retirement fund included language similar to that found in spendthrift trusts, but because the debtor-teacher contributed to the fund, the retire-

ment plan was self-settled and would not qualify as a spendthrift trust under Minnesota law); *Goff*, 706 F.2d at 589 (employer-created and controlled retirement plans may be characterized as "spendthrift trusts" for purposes of 11 U.S.C. §541(c)(2) even though they are not traditional spendthrift trusts).

Moreover, in every decision we could find that addressed the very pointed question whether TIAA is a spendthrift trust under New York law, the answer was a resounding "yes." *See, e.g., In re Reynolds*, No. 87-1515311F, slip op. (Bankr. W.D. Ark., September 18, 1989); *In re Montgomery*, 104 B.R. 112 (Bankr. N.D. Iowa 1989); *In re Woodward*, No. 3-86-03344(3), A.P. No. 3-87-0036, slip op. (Bankr. W.D. Ky., February 16, 1988), *aff'd*, No. 3-86-03344(3)7 Civil Action C88-0161-L(A), slip op. (W.D. Ky., June 24, 1988); *In re Braden*, 69 B.R. 93 (Bankr. E.D. Mich. 1987). In addition, two New York state courts have held that the TIAA-CREF plan has all the characteristics of a spendthrift trust necessary to allow the plan to be excluded under section 541(c)(2). *See Matter of Aurora G. v. Harold Aaron G.*, 98 Misc.2d 695, 414 N.Y.S.2d 632 (1979); *Alexandre v. Chase Manhattan Bank*, 61 A.D.2d 537, 403 N.Y.S.2d 21 (1978).

The proper inquiry under section 541(c)(2), then, is not whether the accumulated funds are in a "traditional" spendthrift trust, but whether the retirement plan bars the beneficiary and his creditors from reaching the funds. If it does, the plan is tantamount to a spendthrift trust under state law. When we look at a retirement plan to determine whether it is a spendthrift trust, the fact that the plan administrators might have to dip into the fund to make up any shortfall is not as important to the analysis as the extent of access to the plan and who has that access.

What about Morter's retirement plan? It is not "self-settled," *see Swanson*, 873 F.2d at 1124, because participation in the plan is a condition of employment and Purdue University contributed the entire amount of Morter's TIAA contract. In estab-

lishing the plan and in contributing the entire cost of Morter's participation, Purdue University intended to provide for the maintenance and support of Morter and his dependents during his retirement, while at the same time protecting him against his own improvidence with regard to the use of the plan funds prior to that time. Consequently, the plan was set up so that Morter would not have any control over the accumuation of its assets until retirement, and then only as set forth in the plan.

The plan provides that, upon retirement, Morter will receive monthly payments from his TIAA plan; he will not receive a lump-sum distribution of the assets. Although Morter can opt to receive a ten percent distribution on retirement, he does not have access to the other ninety percent that will generate income to be paid out over time. The fact that ninety percent of the fund is distributed in the form of periodic payments demonstrates that the fund was structured to insure the preservation of the corpus. To our mind, this scheme bears all the earmarks of a spendthrift trust. *Cf. Watkins*, 95 B.R. at 488 (plan was employer-created and controlled; plan established a pension fund, a plan trustee, and designated named fiduciaries; plan contained provisions for acts of trust administration; plan provided for distribution of monthly benefits with no provisions for lump sum distributions).

Further, the TIAA plan would be enforceable as a spendthrift trust under state law because, in New York, all express trusts are presumed to be spendthrift unless the settlor expressly provides otherwise:

> The right of a beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof is conferred upon such beneficiary by the instrument creating or declaring the trust.

N.Y. Est. Powers & Trust Law §7-1.5(a)(1) (McKinney 1988). *See In re Kriess*, 72 B.R. 933, 942 (Bankr. E.D.N.Y. 1987) ("N.Y. Est. Powers and Trust Law section 7-1.5(1)(1) effec-

tively renders all trusts in New York mandatory spendthrift trusts unless designated otherwise in the trust instrument."). Not only that, pension plans that bar a beneficiary's access "create a situation analogous to a spendthrift trust . . . [that] must be enforced according to their spirit." *In re Guardianship of Dugan*, 29 Misc.2d 980, 982, 22 N.Y.S.2d 831, 833 (1961). Moreover, as noted above, New York courts explicitly have stated that TIAA-CREF plans are spendthrift trusts. *See Montgomery*, 104 B.R. at 117 n.8 ("The substance of [*Alexandre*, 403 N.Y.S. 2d 21, and *Matter of Aurora G.*, 414 N.Y.S.2d 632,] . . . leads the Court to conclude that the New York courts considered the TIAA-CREF plans to be spendthrift trusts."). There can be no doubt: New York law puts Morter's pension benefits well beyond the reach of Farm Credit Services or any other creditor.

To hold otherwise would defeat the legitimate expectations of Purdue University when it set up the plan and paid Morter's share of contributions. The district court held that, although both the TIAA and CREF annuity contracts satisfied the elements of an express trust, "only the CREF contract is so 'unequivocal in nature' as to [whether] the formation of a trust was the object of the parties' agreement." *Morter*, 110 B.R. at 395. We disagree. Purdue University could have fashioned a retirement plan any number of ways. Instead, the University set up a trust so that Morter would be provided for during his retirement and his dependents taken care of after his death. To that end, Morter was denied access to his funds until retirement. Even then, he does not have access to the entire accumulated contributions Purdue University made to TIAA; he receives only a stream of income paid on a monthly basis. One of the underlying policies of 11 U.S.C. §541(c)(2) is to protect the legitimate expectations of the provider of the funds:

> Section 541(c)(2) . . . strikes a delicate balance between enlarging the bankruptcy estate, while still honoring the spendthrift trust donor's wishes under state law. For it is the donor's desires which are protected through the concept of the spendthrift trust. . . . [T]his is underscored by

> the legislative history of §541(c)(2) which notes that "[t]he bankruptcy of the beneficiary . . . should not be permitted to defeat the *legitimate expectations of the settlor* of the trust."

Swanson, 873 F.2d at 1124 (citation omitted) (emphasis in original). The university's retirement fund was structured a certain way for a specific purpose. This purpose cannot be fulfilled if the plan can be raided in order to satisfy creditors.

For the above reasons, we conclude that both the TIAA and CREF components of Morter's retirement plan are exempted from the bankruptcy estate under 11 U.S.C. §541(c)(2). Thus, we need not address Morter's argument that Indiana's recently amended exemption statute, Ind. Code §34-2-28-1 (1990), prohibits levy or execution by judgment creditors on pension funds. That part of the district court's judgment including the TIAA portion of Morter's pension in the bankruptcy estate is hereby

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit